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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 10[illegible] 85

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

BUNTE BROTHERS, INC.,
Respondent.

RESPONDENT'S ANSWER AND BRIEF IN SUPPORT THEREOF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 1021

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

BUNTE BROTHERS, INC.,
Respondent.

RESPONDENT'S ANSWER AND BRIEF IN SUPPORT THEREOF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Answering the petition of Federal Trade Commission, for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, the respondent, Bunte Brothers, Inc., respectfully states that the writ of certiorari should not issue out of this court to review the decree of the United States Circuit Court of Appeals for the Seventh Circuit, entered on February 20, 1940, in which decree the court vacated and set aside an order of the Federal Trade Commission requiring the respondent to cease and desist from alleged unfair methods of competition in connection with intrastate sales of merchandise within the State of Illinois.

Statement.

So that this court may have before it at once the exact terms of the Federal Trade Commission's order to cease and desist, which was vacated by the decree of the Circuit Court of Appeals, it is herewith set forth in *haec verba*:

"It Is Ordered that the respondent, Bunte Brothers, Inc., a corporation, its officers, directors, agents, representatives and employees, in the offering for sale, sale and distribution of candy, in the State of Illinois, do cease and desist from:

"(1) Selling and distributing to dealers candy or other confections so packed and assembled that sales of such candy or other confections to the general public are to be made or may be made by means of a lottery, gaming device or gift enterprise;

"(2) Supplying to or placing in the hands of dealers assortments of candy or other confections which are used or which may be used without alteration or rearrangement of the contents of such packages or assortments to conduct a lottery, game of chance or gift enterprise in the sale and distribution of candy or other confections contained in said assortments;

"(3) Packing or assembling in the same assortment of candy for sale to the public at retail, pieces of candy of uniform size and shape with different colored centers, together with larger pieces of candy, which said larger pieces of candy are to be given as prizes to the purchasers procuring pieces of candy with centers of particular colors.

"It Is Further Ordered that the respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order" (R. 318).

It is thus immediately seen that the acts enjoined by the order of the Commission are intrastate in every aspect. The restraint imposed upon respondent by the Commission's order relates to respondent's intrastate activities as to goods manufactured in Illinois, packed in Illinois, sold in Illinois and consumed in Illinois. In considering petitioner's statement of the case (Petition p. 3) it must be borne in mind, therefore, that every questioned act and transaction of respondent is invested with this intrastate character.

Petitioner's assertions as to the morals or ethics of respondent's intrastate business have no place in this proceeding. The findings of fact by the Commission were challenged in the Circuit Court of Appeals as vague and unsupported conclusions. They were challenged, moreover, upon the ground that they did not constitute jurisdictional foundation for the order to cease and desist. The court below, however, did not adopt these findings but examined the case as presenting, essentially, a question of law involving the interpretation of the Federal Trade Commission Act. It is this construction of the statute which petitioner seeks to review. Should the necessity again arise respondent will, of course, reassert its position as to the insufficiency of the findings of fact to sustain the jurisdiction of the Commission under any construction of the Act.

The actual issue decided by the court below is clearly reflected in the following quotations from the court's opinion:

> "Our question may be stated thus: Is an order directed to an Illinois candy manufacturer engaged in distributing its product in the State of Illinois valid, which commands it to cease and desist from certain unfair practices in the sale and distribution of its candy *in the State of Illinois?*" (110 Fed. (2d) 414.)

Answering this question, the court concluded:

> "That the phase of petitioner's business wherein its practices are unfair is wholly intrastate. It is a phase of petitioner's business which is conducted wholly in Illinois, by an Illinois corporation, which makes and sells its product in Illinois. It is not within the purview of Section 5 of the Federal Trade Commission Act." (110 Fed. (2d) 416.)

In deciding the instant case upon the ground that the order of the Commission, on its face, attempted to regulate purely local sales of the respondent over which the Commission had no jurisdiction, the Circuit Court did not stop to consider the sufficiency of the findings of the Commission. In other words the court's conception of the controversy presented to it for decision did not embrace the consideration of the findings of fact, their jurisdictional sufficiency or the evidence upon which the findings were predicated. Conceding the question to be one of law, the court found it unnecessary to analyze the findings or the evidence, a step in the judicial process which would have been necessary only in the event that the court gave to the statute the broad construction urged by the Commission. Had the court agreed with the Commission and given the statute the extended scope requested, then only would it have been necessary for the court to give consideration to, and to pass upon the sufficiency of, the findings of fact, challenged as they are by the respondent.

Question Presented.

The statement of the question presented, appearing on page 2 of the petition, does not, in its generality, adequately specify the issues necessary to a complete decision of the controversy. As phrased by petitioner, the

question assumes evidentiary support for the findings by the Commission. This assumption appears in the language contained in the question, "which reduce the quantity and divert the course of interstate sales and shipments". The reduction in quantity and the diversion of commerce is thus assumed by petitioner's question to be the direct rather than the indirect or incidental consequence of respondent's intrastate practices, without regard to the presence or absence of additional evidence proving the necessary causal connection between such practices and the alleged reduction and diversion.

A complete review of the validity of the order of the Commission which was vacated by the Court of Appeals would include, therefore, the determination of the following question:

> Are purely local trade practices which through local competition result in incidental reduction of the quantity of interstate sales, such activities as would come within the scope of a federal regulatory statute even if such statute attempted to control intrastate acts affecting interstate commerce?

Should the necessity arise, as has been said, respondent will argue its views upon this subject. For the purpose, however, of passing upon this application for the writ of certiorari, it is probably necessary to decide only the following question:

> Did Congress, under the language of Section 5 of the Federal Trade Commission Act, invest the Commission with jurisdiction over methods of competition not practiced in the course of interstate commerce but which, on the contrary, are used wholly in connection with intrastate transactions and which, at most, affect, in some manner, the business of others engaged in interstate commerce?

ARGUMENT AGAINST GRANTING THE WRIT.

I.

The case presented by the petition and the question involved are not of such general public importance as necessitate review and decision by this court.

In assigning as the reason why this court should grant the writ of certiorari, petitioner asserts that the question presented is of public importance meriting review by this court. Petitioner alleges that the Federal Trade Commission Act "was intended to protect all interstate competition from the evils of unfair practices." This *petitio principii* assumes that such alleged unfair practices did themselves cross state lines as they did in *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, the decision relied upon by petitioner in this connection (Petition p. 6).

In the *Raladam* case, this court succinctly stated the necessary prerequisites of the Commission's jurisdiction as follows:

> "(1) That the methods complained of are unfair; (2) that they are methods of competition in commerce; (3) that a proceeding by the Commission to prevent the use of the methods appears to be in the interest of the public" (pages 646, 647).

It must be assumed that the legislature in enacting the statute recognized as being of public importance those things which the scope of its own language covered. It is not enough merely to state that a case presents a ques-

tion of public importance. It must disclose an issue of public importance in matters within the contemplation of a given statute. Innumerable questions are conceivable of the gravest national concern which properly commend themselves to legislative consideration. But, until the legislature has acted, they are not matters for the courts to consider. The effort of the Commission to stretch the empowering clause of the Act may be of importance to the Commission in its attempt to enlarge its jurisdiction, but it does not constitute that sort of public importance arising in cases under statutes already enacted and properly presentable for decision to the courts.

The asserted claim of public importance does not arise out of the necessity of protecting interstate commerce but is, rather, a self-created slogan whereby the Commission, whose powers have been limited by Circuit Courts of Appeals and by this court and, indeed, by the Congress itself, persists in its demand for a jurisdiction so enlarged that it would cover almost any imaginable phase of commerce, whether interstate or intrastate in nature.

In *Federal Trade Commission* v. *Raladam Co.*, it is to be noted that one of the necessary prerequisites of the Commission's jurisdiction is that the methods complained of "are methods of competition *in commerce.*" "Commerce," of course, must be understood as "*interstate commerce*" according to the language of Section 4 of the statute.

In the later case of *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, this court itself restated the second prerequisite of the Commission's jurisdiction, changing the expression "in commerce" to the phrase "in *interstate* commerce," making the clause read that the methods complained of "are methods of competition in interstate commerce." (Opinion p. 216.)

This court, in the *Raladam* case, was careful to state that:

> "Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable, they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions." (Page 649.)

If it be true, as petitioner contends, that the decision below severely limits the power of the Commission to protect interstate commerce, such limitation results from deliberate Congressional definition. The contention, therefore, that a question is presented of "first importance" to the Federal Trade Commission constitutes no legitimate reason for review by this court. The instant effort of the Federal Trade Commission to enlarge its power beyond its grant of authority was repelled by the decision of the Circuit Court of Appeals. After this reiteration of the limitation of the Commission's jurisdiction, no issue necessitating a decision by this court remains.

II.

The decision of the court below followed the settled law as to which there is no conflict.

It is conceded that the merchandising methods of the respondent enjoined by the cease and desist order of the Commission did not cross state lines, but were wholly intrastate in nature. To sustain the order, therefore, it became incumbent upon petitioner to take the position that these intrastate practices, while not performed "in commerce" (meaning in interstate commerce), did, never-

theless, affect interstate transactions of would-be competitors. The court below concluded that the language of Section 5 of the Federal Trade Commission Act, "in commerce," was not the equivalent of "affecting interstate commerce", but, on the contrary, referred to activities themselves practiced in interstate commerce.

In so deciding, the Circuit Court of Appeals followed the specifically expressed intent embodied in the Act itself by the Congress in the terms of the enactment. It followed and observed, moreover, the distinction between the language "in commerce" and "affecting interstate commerce" announced by this court in *Schechter* v. *United States,* 295 U. S. 495, where the court held that the words "in" and "affecting" have different connotations and that the term "affecting interstate commerce" conferred certain powers over intrastate activities, while the term "in commerce" restricts the scope of the statute to activities in the current or flow of interstate commerce. This portion of the opinion by this court has been in no way modified by its later decisions (opinion 542, 544).

As has been heretofore pointed out (*supra*), this court, in *Federal Trade Commission* v. *Raladam Co.,* 283 U. S. 643, 646, and in *Federal Trade Commission* v. *Royal Milling Co.,* 288 U. S. 212, 216, again unmistakably asserted that, "To come within the condemnation of the statute methods charged as unfair must be 'methods of competition *in interstate commerce.*'" (Italics supplied.)

Hewing to the line thus established by this court, the court below said: (*Bunte Bros.* v. *Federal Trade Commission,* 110 Fed. 2d 414):

> "We are on secure and undisputed ground, when we assume that an order of the Commission to be valid must be supported by evidence which establishes: (1)

The methods used are unfair; (2) The methods of competition condemned must be used in interstate commerce; (3) The proceeding by the Commission to prevent the use of the methods must be in the interest of the public. *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 216, 53 S. Ct. 335, 77 L. Ed. 706."

Confronted by the limitation upon its power in the language of the Act and by the decisions of this court as well as by the decisions of various Circuit Courts of Appeals, attempt was made, at the behest of the Federal Trade Commission, to amend the Act, to make it apply to unfair methods of competition *"in or affecting"* interstate commerce. On reconsideration of Senate Bill 944, 74th Congress First Session, the language "in or affecting" commerce was objected to as too broad in scope. (Congressional Record, Vol. 79, pt. 2, pp. 1842, *et seq.*)

The Bill was re-introduced during the Second Session of the 74th Congress (Senate Bill 3744) with the words "or affecting" significantly and deliberately left out. This is the statute which was finally adopted in 1938 (52 Stat. 111).

Thus, it appears that Congress was fully aware of the distinction between the language "in commerce" and "affecting commerce." Its original enactment had been construed by the Supreme Court which observed and confirmed the original legislative definition. After all of which, the Congress, being fully advised, rejected as too broad and all-inclusive the expression "affecting commerce."

The decisions relied upon by petitioner as being in conflict with the decision of the court below fail to sustain petitioner's contention that such a conflict exists. To constitute a conflict of decisions, it is, of course, necessary that

these decisions deal with substantially like situations and decide substantially identical questions. It should, therefore, be remembered that the decision of the court below dealt with certain local sales practices by a single candy manufacturer whose product was made, sold, distributed and consumed within the State of Illinois.

On the other hand, in *National Harness Mfrs.' Association* v. *Federal Trade Commission*, 268 Fed. 705, which is relied upon by petitioner as conflicting with the decision of the court below (petition p. 7), there existed a nationwide conspiracy between the members of the Association in violation of the Sherman Anti-Trust Act. The respondent, *Wholesale Saddlery Association*, consisted of persons and concerns engaged in selling harness and saddlery goods in interstate commerce throughout the various states and territories of the United States. The respondent, *National Harness Mfrs.' Association*, was composed of concerns who purchased their supplies of harness and saddlery goods from wholesalers and jobbers in interstate commerce, including members of the Saddlery Association. It was found that the officers and members of both associations co-operated by means of combinations and agreements extending throughout the various states to impose certain restrictions upon the interstate business in harness and saddlery goods (page 710).

The facts in that case are, therefore, so plainly dissimilar from the facts in the instant case that the language of the court quoted by the petitioner has no applicability. Moreover, when the quoted portion of the opinion is read in its context, it appears that this language of the court was merely in answer to the contention that the challenged activities of the respondent did not constitute *commercial* activities. This contention the court answered by referring to the cases of *Loewe* v. *Lawlor*, 208 U. S. 774; *Eastern*

States Lumber Co. v. *United States*, 234 U. S. 600; and *Nash* v. *United States*, 229 U. S. 373, where it was held that persons conspiring with the intention of restraining interstate commerce are guilty of violating the Sherman Anti-Trust Act without being themselves engaged in a commercial occupation.

Since the Commission, of course, has power to institute a proceeding for a violation of the Sherman Act, the court was clearly correct in affirming the cease and desist order based as it was upon a proved infringement of the Sherman Act.

Chamber of Commerce of Minneapolis v. *Federal Trade Commission*, 13 Fed. 2d 673, (petition p. 7) involved a proceeding by the Commission charging that the members of the Chamber were engaged in a conspiracy among themselves and with others to boycott and refuse to deal with the St. Paul Grain Exchange or its members, or the Equity Co-operative Exchange, or the customers of any of them. Against the contention of respondents in that case that the Chamber was not engaged in interstate commerce, the court held that that body was "an instrumentality in the current of interstate commerce" and, consequently, that its members were engaged in the operation of an instrumentality of interstate commerce. In so holding, the court cited and relied upon previous adjudications by this court to the effect that stock or commodity exchanges, stockyards, etc., constitute channels or throats of the current or flow of interstate commerce. Hence, the practices complained of in the *Chamber of Commerce* case occurred directly *in the stream of interstate commerce which was handled and controlled by the respondents themselves.* This is diametrically opposed to the facts of the instant case in which the challenged commerce of the respondent is admittedly wholly intrastate.

In addition, in the *Chamber of Commerce* case, the court found that the officers and members of the respondent organization were engaged in a *conspiracy* to restrain interstate commerce, thus directly contravening the prohibitions of the Sherman Act. The proceeding of the Commission thus being founded upon a violation of the Sherman Act, the court employed language which had been developed in a series of decisions as defining the applicability of the Sherman Act to intrastate activities. It is familiar doctrine that in circumscribing the scope of the Sherman Act with relation to intrastate activities, the courts have developed the criterion that the indicted intrastate activities must affect interstate commerce. Having held that the respondent organization and the members thereof were engaged in the operation of an agency of interstate commerce, which alone was sufficient to establish jurisdiction of the Commission, the subsequent language of the court was unnecessary dictum which finds its explanation in the existence of a *conspiracy* affecting interstate commerce.

The broad and unnecessary *obiter dictum* quoted in italics in the petitioner's brief (page 8) must be considered in connection with the particular instrumentality under investigation. This instrumentality was held to be "in the current of interstate commerce". The Chamber, while intrastate in position and physical immobility, was interstate in purpose and operation. It was a turntable on an interstate track. If the italicized language relied upon could be disassociated from the other language of the opinion (not italicized) designating the Chamber as an instrumentality in the current of interstate commerce, then, not only would the opinion conflict with other opinions by other Circuit Courts of Appeals, it would run counter, also, to the statute itself and with the decisions of this court.

It may be well at this point to observe a bit of practical, legal philosophy long ago announced by this court and from which no departure has ever been suggested. Chief Justice Marshall stated in *Cohens* v. *Virginia,* 6 Wheat. 264, 399, 5 L. Ed. 257, 290:

> "The counsel for the defendant in error urge, in opposition to this rule of construction, some dicta of the court, in the case of *Marbury* v. *Madison.*
>
> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

To the same effect is *Humphrey* v. *U. S.,* 295 U. S. 602, 627.

The cases cited by petitioner being essentially dissimilar from the case before the court below, there exists no conflict between the Circuit Courts of Appeals in the application of the Federal Trade Commission Act to local sales methods of the kind here in question. Intrastate transactions affecting interstate commerce have been held to come within the jurdiction of the Federal Trade Commission only if the proceeding was based upon the Sherman Act finding a conspiracy or other concerted action with the intent to restrain or monopolize interstate commerce. In flat contradiction of the unsupported contention of

petitioner, there is practical unanimity in the Circuit Courts in the construction of this phase of the Federal Trade Commission Act. The courts have consistently adhered to the language of the statute and the pronouncements of this court by rejecting the attempts of the Federal Trade Commission to extend its jurisdiction to intrastate transactions on the mere ground that they affected interstate commerce.

In *California Rice Industry* v. *Federal Trade Commission* (C. C. A. 9th), 102 Fed. (2d) 716, the Commission attempted to prohibit the fixing of quotas of rice which the respondents might mill or process. The court denied the asserted jurisdiction over these intrastate practices, saying, at page 723:

> "Undoubtedly the fixing of such quotas 'affects' the volume of rice which after milling is sold and delivered into interstate commerce, but unlike the National Labor Relations Act the Federal Trade Commission Act does not create a control in the Commission of practices both 'affecting' interstate commerce and 'in' interstate commerce. Since the Commission's authority is confined to transactions, 'in' interstate commerce, paragraph '5' of its order to cease and desist from fixing or determining the quotas or percentages of the rice crop that the Miller respondents may mill or process * * *' is beyond its jurisdiction and void."

In *Ward Baking Co.* v. *Federal Trade Commission* (C. C. A. 2d), 264 Fed. 330, there was an attempted exercise of jurisdiction over the practice of giving premiums in the sale of bread within the state of Rhode Island. Overruling the order of the Commission, the court said, at page 331:

> "Doubtless bread sold in Massachusetts to be delivered to the purchaser in Rhode Island would be

interstate commerce, but that is not this case. Moreover, the Commission is not finding the act of transportation from Massachusetts to Rhode Island unfair, but *the method of local sales* made in Rhode Island. If the respondent had its own stores in Rhode Island, and carried to them from Massachusetts bread to be there sold, *this method of selling could not be considered interstate commerce.*" (Italics supplied.)

To the same effect see: *Winslow* v. *Federal Trade Commission* (C. C. A. 4th), 277 Fed. 206; *Utah-Idaho Sugar Co.* v. *Federal Trade Commission* (C. C. A. 8th), 22 Fed. 2nd. 122, 125; *Canfield Oil Co.* v. *Federal Trade Commission* (C. C. A. 6th), 274 Fed. 571, 574, 575; *Federal Trade Commission* v. *Claire Furnace Co.* (C. C. Dist. of Col.), 285 Fed. 936, 941 (reversed in 274 U. S. 160 on the distinct ground that the lower court improvidently granted an injunction, plaintiff having an adequate remedy at law).

III.

The decision below is wholly consistent with decisions construing other statutes regulating interstate commerce.

Petitioner's contention that the decision below conflicts with cases involving other statutes regulating and protecting interstate commerce is without foundation. Any attempt to compare decisions arising under the Federal Trade Commission Act with cases involving other federal regulatory statutes must take into consideration the purpose of the particular statute and the language by which Congress defined the field of regulation intended to be covered by the statute. It will be seen that in many statutes Congress deliberately employed language defining their scope differently from the jurisdiction of the Federal Trade Commission.

The National Labor Relations Act (49 Stat. 449, 29 U. S. C. Sec. 151) empowers the National Labor Relations Board:

> "To prevent any person from engaging in any unfair labor practice *affecting* commerce." (Italics supplied) (49 Stat. 453, Sec. 10(a); 29 U. S. C. Par. 160(a).)

The Act further provides:

> "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce, or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." (40 Stat. 450, Sec. 2(7); 29 U. S. C. Par. 152 (7).)

The term "commerce" is defined as meaning, "trade, traffic, commerce, transportation or communication among the several States", etc. (49 Stat. 450, Sec. 2(6); 29 U. S. C. Par. 152(6).)

Thus Congress expressly recognized the distinction between jurisdiction over practices "in commerce" and practices "affecting commerce". In *Apex Hosiery Co.* v. *Leader* (decided May 27, 1940, 84 L. Ed. 913 (Advance sheets) 917), *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 607 and *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1, 31, this court emphasized the broad jurisdiction conferred upon the National Labor Relations Board by the phrase "affecting commerce" as distinguished from the scope of other federal statutes. To the same effect see:

Blankenship v. *Kurfman* (C. C. A. 7), 96 Fed. (2d) 450, 456;

Leader v. *Apex Hosiery* (C. C. A. 3), 108 Fed. (2d) 71, 81 (affirmed by this court in *Apex Hosiery* v. *Leader*, May 27, 1940).

The Federal Employers' Liability Act of 1908 (35 Stat. 65; 45 U. S. C. Sec. 51) provides that:

> "Every common carrier by railroad while engaged in commerce between any of the several States or territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * *." (Sec. 1; 46 U. S. C. Par. 51.)

In construing the scope of this Act the phrase "employed in interstate commerce" has authoritatively been held to mean that the injured employee, at the time of the injury, must be actually engaged in interstate transportation, or in work so closely related to it as to be practically part of it. The employment in occupations which ultimately affect the interstate movement of goods was held insufficient to invoke this Act.

See:

Shanks v. *Delaware L. & W. R. Co.*, 239 U. S. 556, 558.

Erie R. Co. v. *Welsh*, 242 U. S. 303, 306.

Chicago & Eastern Illinois R. Co. v. *Industrial Commission*, 284 U. S. 296, 299.

By an enactment of the utmost significance in considering the intention of Congress when using the phrase "in commerce" or "affecting commerce", Congress, in 1939, amended the first section of the Employers' Liability Act by adding the following provision:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way

directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended." (53 Stat. 1404.)

Considering that the term, "employed in interstate commerce", needed enlargement, Congress thus provided for the inclusion in the statute of occupations affecting commerce by expressly extending the application of the Act to employees whose duties "shall, in any way directly or closely and substantially, *affect* such commerce."

The Fair Labor Standards Act (52 Stat. 1060; 29 U. S. C. Secs. 205, 207) governs every employee "who is engaged in commerce or in the production of goods for commerce". The phrase "engaged in commerce" has been held not to cover occupations affecting interstate commerce. See *U. S.* v. *F. W. Darby Lumber Co.* (D. C. S. D. Ga.), 32 Fed. Sup. 734, 737.

The Interstate Commerce Act (41 Stat. 474; 49 U. S. C. Sec. 1) applies generally "to common carriers engaged in—(a) the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are carried under a common control, management, or arrangement for a continuous carriage or shipment; * * *" (Sec. 1 (1a), 49 U. S. C. Par. 1 (1a)). Viewing common carriers as essential agencies for the movement of interstate commerce, Congress thus subjected, *a priori,* all common carriers to the jurisdiction of the Interstate Commerce Commission.

Section 2 provides for the application of the Interstate Commerce Act to the transportation of passengers and property and transmission of intelligence. In a proviso to this section an exception is made with respect "to the transportation of passengers or property, or to the receiving, delivery, storage or handling of property, wholly within one state and not shipped to or from any foreign country from or to any place in the United States as aforesaid; * * *." The effect of this proviso is to exempt transportation which is established to be wholly within one state from the scope of the Act which, *a priori*, vests the Interstate Commerce Commission with jurisdiction over all transportation of passengers and property.

Thus in the broad language of the Interstate Commerce Act is found express legislative sanction for the establishment and regulation of intrastate rates, unless such rates concern charges for transportation wholly intrastate, having no contact or connection with, or influence upon, the dominant interstate character of the common carrier.

In the *Shreveport Rate* Case (*Houston & Texas Railway Co.* v. *United States*), 234 U. S. 342, which is relied upon by petitioner as inconsistent with the construction of the Federal Trade Commission Act by the court below (petition p. 9), the Interstate Commerce Commission, in a proceeding against the Houston, East & West Texas Railway Company and the Houston and Shreveport Railroad Company, found that the carriers maintained unreasonable rates in their interstate transportation from Shreveport, Louisiana, to various points in Texas. The Commerce Commission consequently established the maximum class rates for this interstate traffic. These interstate rates from Shreveport to certain points in Texas were higher than rates charged by the carriers from cities in Texas to such points under substantially similar con-

ditions and circumstances. The Interstate Commerce Commission found:

> "That thereby 'an unlawful and undue preference and advantage' was given to the Texas cities, and a 'discrimination' that was 'undue and unlawful' was effected against Shreveport."

The order of the Commission, therefore, first fixed and established the maximum class rates to apply to the interstate transportation of traffic from Shreveport, Louisiana, to named points in Texas. In connection with, and incidental to, this regulation of the interstate rates of the carriers, the order of the Commission directed the carriers:

> "to desist from charging higher rates for the transportation of any commodity from Shreveport to Dallas and Houston, respectively, and intermediate points than were contemporaneously charged by the carriage of such commodity from Dallas and Houston toward Shreveport for equal distances, as the Commission found that relation of rates to be reasonable."

It is to be noted that the interstate as well as the intrastate traffic regulated by this order of the Commission was carried on with the same trains serving interstate as well as intrastate transportation, on the same tracks leading from points outside of Texas to cities in Texas and serving also as connections between those cities within the State of Texas which were mentioned in the order.

This background of the order in question is illuminated by the following passages from the opinion of the court:

> "While these decisions sustaining the Federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate

the principle that Congress, in the exercise of its paramount power, may prevent the *common instrumentalities of interstate and intrastate commercial intercourse* from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a state, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.

"This principle is applicable here. We find no reason to doubt that Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms. That an unjust discrimination in the rates of a common carrier, by which one person or locality is unduly favored as against another under substantially similar conditions of traffic, constitutes an evil, is undeniable; and where this evil consists in the *action of an interstate carrier* in unreasonably discriminating against interstate traffic over its line, the authority of Congress to prevent it is equally clear. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. *The use of the instrument of interstate commerce* in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention." (p. 353, 354) (Italics supplied.)

Having decided that the regulation of these intrastate rates was a necessary part of the regulation of the inter-

state rates and that such regulation came within the power which Congress had constitutionally vested in the Interstate Commerce Commission by Section 3 of the Act (24 Stat. 380), the court proceeded to consider the effect of the proviso to Section 1(2) of the Act providing that the Act shall not apply to the transportation of passengers or property wholly within one state. The Commerce Court had held:

> "That this proviso is a mere disclaimer of any intention on the part of Congress, in enacting the Act to regulate commerce, to exceed its constitutional power and that it was not designed to limit or confine the power which Congress could exercise—and, in our opinion, has exercised—in respect of such matters as are here in dispute. If this construction be correct, it follows that the proviso in no way prevents the application of the third section to the facts of this case, and, therefore, it was within the authority of the Commission to make the order in question." (205 Fed. 380, 384)

This Court, in affirming the decision of the Commerce Court, held that the carriers, being instrumentalities of interstate commerce, were subject to the jurisdiction of the Commission and that their intrastate rates in question, giving undue preference to certain localities, came within the language of the third section of the Act. It said:

> "This language is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn. There is no exception or qualification with respect to an unreasonable discrimination against interstate traffic produced by the relation of intrastate to interstate rates as maintained by the carrier." (P. 356)

Since the proviso to the first section of the Act constitutes an exception to the power generally conferred upon the Commission by the third Section of the Act, the court gave to it a strict construction as not derogating from the general powers of the Commission unless it should be shown to be applicable in letter as well as spirit.

> "These words of the proviso have appropriate reference to exclusively intrastate traffic, separately considered; to the regulation of domestic commerce, as such. The powers conferred by the act are not thereby limited where interstate commerce itself is involved. This is plainly the case when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act." (P. 358)

In view of this reasoning of the court, the assertion of petitioner that the considerations and the rule laid down in the *Shreveport* case apply, *a fortiori*, to the instant case (petition p. 10) is, therefore, wholly unwarranted. Contrary to the Interstate Commerce Act, the Federal Trade Commission Act confers but a limited jurisdiction upon the Trade Commission. In construing the Trade Commission Act the court is required to consider not the effect of an exception to a general power vested in the Commission, but the meaning of that part of the statute which constitutes the grant of authority.

A railroad operating interstate occupies a significant and important position in the national economy. It is obliged to serve, at prescribed rates, anyone lawfully requesting its facilities. The basic structure of such institutions, both physically and financially, is determined by the interstate character of its business. Its rails or

lines run continuously across state borders. Its stations house under one roof all of the employees and paraphernalia necessary to handle both interstate and intrastate transportation. The same freight depots receive, load and unload goods moving interstate and goods moving in intrastate journeys. Its round houses and switching equipment are similarly used and its rolling stock moves across state lines with through passengers and freight and with passengers and freight of local destination. Its bonds and debentures are sold upon the basis of its total earnings.

When, therefore, the Interstate Commerce Commission comes to determine railroad rates, it must consider the carrier as a whole, its cost of operation, its earnings and its obligations. Hence some measure of control of local rates is inescapably necessary. Considerations of the same import apply, essentially, to steamship lines, telegraph and telephone companies and other media of transportation and transmission.

The attempt to regulate intrastate sales of penny bars of candy under a statute granting power to consider only acts and practices in interstate commerce are hardly comparable to the regulation of rates of national common carriers under an empowering statute of the breadth and scope of the Interstate Commerce Act.

The Clayton Act (38 Stat. 730; 15 U. S. C. Sec. 13) provides that:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchases of commodities of like grade and quality where either or any of the purchases involved in such discrimination are in commerce, * * * and where the effect of such discrimination may be to substantially

lessen competition or tend to create a monopoly in any line of commerce * * *"

It has consistently been held that in order to come within the ambit of this statute the person charged with violation thereof must have committed a discriminatory act in the course of interstate commerce. Allegations that the activities complained of affect interstate commerce are not sufficient. See:

Lipson v. *Socony-Vacuum Corp.* (C. C. A. 1), 76 Fed. (2d) 213, 216, 217.

Port & Co. v. *Girdler,* (N. Y. Supreme Court, November, 1939), CCH Trade Regulations No. 25,347.

American Can Co. v. *Ladoga Canning Co.* (C. C. A. 7), 44 Fed. (2d) 763, is alleged by petitioner to apply the Clayton Act on the ground that defendant's intrastate sales affected interstate commerce. In passing, it may be remarked that the opinion in that case was written by the same judge who rendered the opinion of the court below construing the language of the Trade Commission Act as not covering intrastate activities affecting interstate commerce. In the *American Can Co.* case it was found that the defendant company discriminated in its sales to purchasers inside the state as well as outside the state. The greater part of its product was sold to the VanCamp Company which maintained a factory in the same state in which defendant's plant was located. The VanCamp Company used the cans purchased from the defendant for food packing and in turn sold its product packed in said cans in interstate commerce, throughout the United States. The sales by the defendant which were alleged to be discriminatory thus initiated the interstate journey of defendant's product which was only temporarily inter-

rupted by the process of filling the cans in Van Camp's plant and from there continued its interstate movement. The court's conception of the sale of the cans by the defendant as a part of an intended and continuous current of interstate commerce is expressed beyond doubt in the following part of its opinion:

> "The tin cans were useless save as they might be used as containers for food stuffs. Both parties knew they were to be so used. They were sold with the understanding that the purchaser would use them to distribute goods in interstate commerce." (P. 771)

Moreover, in deciding that these sales by defendant were "in the course of interstate commerce", the court followed explicitly the stream of commerce doctrine laid down in *Stafford* v. *Wallace,* 258 U. S. 459, and *Swift* v. *United States,* 196 U. S. 375, and treated the packing industry of Van Camp as a channel or throat of commerce analogous to the stock yards. The *American Can* case, therefore, affords no basis for petitioner's contention that defendant's intrastate sales were held to constitute sales in the course of interstate commerce because of their effect upon such commerce.

In fundamental opposition to the facts of the *American Can Co.* case, the goods sold by respondent in the instant case are sold, as well as consumed, in the state of their origin. Their movement does at no time become a part of the stream of interstate commerce. Their circulation begins and ends within the boundaries of a single state. The decision of the *American Can Co.* case is, therefore, wholly inapplicable to the instant case.

As the last phase of its argument, petitioner suggests that the Federal Trade Commission Act was passed in order to supplement the Sherman Act and that the Trade

Commission Act could not be construed to be narrow in scope than the statute which it was designed to supp ment. There is, of course, no dispute about the fact th the Trade Commission Act was intended to supplem the Sherman Act and that the Trade Commission is e powered to enforce the Sherman Act. The Sherman A however, possesses a definite objective which is stated unmistakable terms in the language of the Act itself, S tion 1 of which provides:

> "Every contract, combination in the form of tru or otherwise, or conspiracy, in restraint of trade commerce among the several states, or with forei nations, is declared to be illegal." (26 Stat. 209; U. S. C. Par. 1)

Section 2 of the Sherman Act provides:

> "Every person who shall monopolize, or attem to monopolize, or combine or conspire with any oth person or persons to monopolize any part of the tra or commerce among the several states, or with forei nations, shall be deemed guilty of a misdemean * * *". (26 Stat. 209; 15 U. S. C. Par. 2)

The language of the foregoing provisions discloses th Congress was striking at contracts, combinations and co spiracies in restraint of trade or commerce and at m nopolies, actual or attempted or contemplated by a co bination or conspiracy. Section 1, therefore, in effe makes unlawful conspiracies in restraint of commerce, a Section 2 declares to be illegal the monopolization or co spiracy or attempt to monopolize trade or commerce. both sections the trade or commerce referred to is t trade or commerce *"among the several states or wi foreign nations"*.

Two distinct prerequisites have been evolved for the application of the Act: (1) There must be a combination, conspiracy or other concerted action to restrain commerce, or an actual monopoly or attempt to monopolize a business or industry; (2) The challenged activities must be aimed at interstate commerce and where these activities take place wholly within one state there must be an intention to restrain interstate commerce.

In the following group of cases, proceedings by the Federal Trade Commission were dismissed on the distinct ground that the evidence did not show a combination or other concerted action or a monopoly or an unlawful discrimination by the defendants:

Federal Trade Commission v. *Sinclair Refining Co.*, 261 U. S. 464, 473.

Federal Trade Commission v. *Curtis Publishing Co.*, 260 U. S. 568, 581.

Federal Trade Commission v. *Gratz*, 253 U. S. 421, 428.

B. S. Pearsall Butter Co. v. *Federal Trade Commission* (C. C. A. 7), 292 Fed. 720, 722.

Federal Trade Commission v. *Paramount Famous-Lasky Corp.* (C. C. A. 2), 57 Fed. (2d) 152, 157.

American Tobacco Co. v. *Federal Trade Commission*, 9 Fed. (2d) 570, 582.

In the following line of cases, actions under the Sherman Act were dismissed by reason of the fact that the intrastate activities on which the charges were based had primarily a local object and were not intended to restrain or monopolize interstate commerce:

Apex Hosiery Co. v. *Leader*, ... U. S. ..... (Decided May 27, 1940, 84 L. Ed. Advance Sheets 913).

Levering & Carrigues Co. v. *Morrin*, 289 U. S. 103, 107.

Moore v. *New York Cotton Exchange, et al.*, 270 U. S. 593.

Industrial Association of San Francisco v. *United States*, 268 U. S. 64, 80.

United Leather Workers v. *Herkert*, 265 U. S. 457, 471.

Blumenstock Bros. v. *Curtis Publishing Co.*, 252 U. S. 436, 442.

C. E. Stevens Co. v. *Foster & Kleiser Co.* (C. C. A. 9), 109 Fed. (2d) 764.

Foster & Kleiser Co. v. *Special Site Sign Co.* (C. C. A. 9), 85 Fed. (2d) 742.

Ewing-Von Almen Dairy Co. v. *C. & C. Ice Cream Co.*, (C. C. A. 6), 109 Fed. (2d) 898.

Blankenship v. *Kurfman* (C. C. A. 7), 96 Fed. (2d) 450.

Abouaf v. *Spreckels Co.* (D. C. Cal.), 26 Fed. Sup. 830, 833.

United States v. *Great Western Sugar Co.* (D. C. Neb.), 39 Fed. (2d) 149, 151.

United States v. *Southern California Wholesale Grocers Assn.* (D. C. Cal.), 7 Fed. (2d) 944, 947.

Andrew Jergens Co. v. *Woodbury* (D. C. Del.), 271 Fed. 43.

In the case at bar, admittedly, there is no evidence and consequently no finding that the respondent was guilty of either of the two prerequisite factors of liability, both of which are necessary to sustain a charge under the Sherman Act. Respondent did not participate in a conspiracy

or other concerted action, nor did it attempt to monopolize the business in which it was engaged. Respondent, moreover, had no intention of restraining interstate commerce, the sole object of its criticised practices being the sale of its goods within the State of Illinois. In the absence of these two essential elements of the Sherman Act the Commission has no jurisdiction over intrastate methods of competition.

CONCLUSION.

The Circuit Court of Appeals recognized the injunctive order of the Commission entered as the result of its own application and prosecution, as being a bid for authority to transgress the limitations of the statute which created it and, following the language of that Act and the binding decisions by this court, left the matter where it belongs, —with the Congress. Before that body, if the subject be regarded as of the commanding public importance claimed for it, an amendment may be enacted conferring such increased authority upon the Commission as the law-making department of the nation deems necessary.

Because the question presented by the petition has been authoritatively answered by both legislature and judiciary, it is urged that the petition for certiorari to the Circuit Court of Appeals of the Seventh Circuit be denied.

Respectfully submitted,

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